



LIBRARY OF CONGRESS

U.S. Copyright Office

[Docket No. 2011-3 CRB]

Scope of the Copyright Royalty Judges Authority to Adopt Confidentiality Requirements upon Copyright Owners within a Voluntarily Negotiated License Agreement

AGENCY: U.S. Copyright Office, Library of Congress.

ACTION: Final Order.

SUMMARY: The Copyright Royalty Judges, acting pursuant to 17 U.S.C. 802(f)(1)(B), referred a novel material question of substantive law to the Register of Copyrights concerning the Copyright Royalty Judges' authority to adopt regulations imposing a duty of confidentiality upon copyright owners, whether or not that duty is included in a voluntarily negotiated license agreement between copyright owners and licensees in a proceeding under section 115 of the Act. The Register of Copyrights responded in a timely fashion by delivering a Memorandum Opinion to the Copyright Royalty Board on July 25, 2013.

DATES: Effective Date: July 25, 2013

FOR FURTHER INFORMATION CONTACT: Stephen Ruwe, Attorney Advisor, Copyright GC/I&R, P.O. Box 70400, Washington, DC 20024. Telephone: (202) 707-8380. Telefax: (202) 707-8366.

SUPPLEMENTARY INFORMATION: In the Copyright Royalty and Distribution Reform Act of 2004, Congress amended Title 17 to replace the Copyright Arbitration Royalty Panel ("CARP") with the Copyright Royalty Judges ("CRJs"). One of the functions of the CRJs is to make determinations and adjustments of reasonable terms and rates of royalty payments as provided in sections 112(e), 114, 115, 116, 118, 119, and 1004 of the Copyright Act. The CRJs

have the authority to request from the Register of Copyrights (“Register”) an interpretation of any novel material question of substantive law that relates to the construction of provisions of Title 17 and arises out the course of the proceeding before the CRJs. *See* 17 U.S.C. 802(f)(1)(B).

On June 25, 2013, the CRJs delivered to the Register: (1) an Order referring a novel material question of substantive law; and (2) a brief filed with the CRJs by Settling Participants (identified below in the Register’s Memorandum Opinion). The CRJs’ delivery of the request for an interpretation triggered the 30–day response period prescribed in section 802 of the Copyright Act. This statutory provision states that the Register “shall transmit his or her decision to the Copyright Royalty Judges a written response within 30 days after the Register receives of all briefs or comments from the participants.” *See* 17 U.S.C. 802(f)(1)(B). The statute also states that “[i]f such a decision is timely delivered to the Copyright Royalty Judges, the Copyright Royalty Judges shall apply the legal determinations embodied in the decision of the Register of Copyrights in resolving material questions of substantive law.” *Id.* On July 25, 2013 the Register responded in a Memorandum Opinion to the CRJs that addressed the novel questions of law. To provide the public with notice of the decision rendered by the Register, the Memorandum Opinion is reproduced in its entirety, below.

Dated: July 29, 2013

Maria A. Pallante,
Register of Copyrights

[BILLING CODE: 1410-30-8]

Before the

**U.S. Copyright Office
Library of Congress
Washington, D.C. 20559**

In the Matter of)	
)	
Mechanical and Digital Phonorecord)	Docket No. 2011-3 CRB
)	(Phonorecords II)
Delivery Rate Adjustment Proceeding)	
_____)	

**MEMORANDUM OPINION
ON A NOVEL QUESTION OF LAW**

I. Procedural Background

On May 17, 2012, the Copyright Royalty Judges (“CRJs”) published for comment in the Federal Register proposed regulations for the section 115 compulsory license, which were the result of a settlement submitted to the CRJs on April 11, 2012. Notice of Proposed Rulemaking, Mechanical and Digital Phonorecord Delivery Compulsory License, Docket No. 2011–3 CRB Phonorecords II, 77 FR 29259 (May 17, 2012). The proposed regulations included “confidentiality requirements” in 37 CFR 385.12(f) and 385.22(e), which would require copyright owners to maintain in confidence statements of account that they receive under the license. *Id.*

The “confidentiality requirements” proposed for sections 385.12(f) and 385.22(e) state:

Confidentiality. A licensee's statements of account, including any and all information provided by a licensee with respect to the computation of a subminimum, shall be maintained in confidence by any copyright owner, authorized representative or agent that receives it, and shall solely be used by the copyright owner, authorized representative or agent for purposes of reviewing the amounts paid by the licensee and verifying the accuracy of any such payments, and only those employees of the copyright owner, authorized representative or agent who need to have access to such information for such purposes will be given access to such information; provided that in no event shall access be granted to any individual who, on behalf of a record company, is directly involved in negotiating or approving royalty rates in transactions authorizing third party services to undertake licensed activity with respect to sound recordings. A licensee's statements of account, including any and all information provided by a licensee with respect to the computation of a subminimum, shall not be used for any other purpose, and shall not be disclosed to or used by or for any record company affiliate or any third party, including any third-party record company.

Id. at 29262.

After considering both the Proposed Settlement regulations and the public comments received in response to them, on March 27, 2013, Chief Copyright Royalty Judge Suzanne Barnett proposed two material questions of substantive law for referral to the Register and invited participants to submit briefs to accompany the referral of questions to the Register of Copyrights, pursuant to 17 U.S.C.

802(f)(1)(A)(ii). The referral asked whether the confidentiality requirements proposed for §§ 385.12(f) and 385.22(e) encroach upon the exclusive statutory domain of the Register under section 115 of the Act. CRJ Order Referring Material Question of Substantive Law, Docket No. 2011-3 CRB (Mar. 27, 2013).¹ After receiving a single brief filed jointly by the Settling Participants² regarding whether proposed terms encroach upon the exclusive statutory domain of the Register, the Chief Copyright Royalty Judge delivered the referred questions and the Settling Participants brief to the Register on April 17, 2013.

Pursuant to 17 U.S.C. 802(f)(1)(A)(ii), the Register issued a timely reply clarifying that the proposed terms do not encroach upon the Register's authority with respect to statements of account as provided in 17 U.S.C. 115(c)(5). Memorandum Opinion on Material Questions of Substantive Law, Docket No. 2011-3 CRB (May 1, 2013). However, the Register also noted that it is unclear whether the CRJs have any independent authority to issue regulations such as the proposed "confidentiality requirement" which would impose obligations on a copyright owner with regard to what he or she is able to do with a statement of account received by a licensee. The Register suggested that the question of whether the CRJs have authority to issue regulations imposing requirements on what a *copyright owner* (as opposed to a nonexclusive licensee) may do or not do with information in a statement of account after that statement has been prepared and served in accordance with the Office's regulations represents a novel question of law that may be separately referred to the Register. *Id.*

¹ The CRJ Order Referring Material Question of Substantive Law also referred a question and participants' views regarding detail requirements, which are not at issue in this referral of a novel question of law.

² The National Music Publishers' Association, Inc., the Songwriters Guild of America, the Nashville Songwriters Association International, the Church Music Publishers Association, the Recording Industry Association of America, Inc., the Digital Media Association, CTIA - The Wireless Association, Google, Inc., RealNetworks, Inc., Rhapsody International Inc., Cricket Communications, Inc., and Rdio, Inc.

Pursuant to 17 U.S.C. 802(f)(1)(B), on May 17, 2013 the Chief Copyright Royalty Judge issued an order to the proceeding participants regarding referral of a novel material question and set forth a schedule governing receipt of comments by the participants in the proceeding. On June 7, 2013, the Settling Participants filed the only comment in response to the order. On June 25, 2013, Chief Judge Barnett delivered the following novel material question to the Register, along with the sole comment filed by the Settling Participants:

Do the Judges have the statutory authority to adopt regulations imposing a duty of confidentiality upon copyright owners, whether or not that duty is included in a voluntarily negotiated license agreement between copyright owners and licensees in a proceeding under section 115 of the Act?

CRJ Order Referring Novel Question of Law and Setting Briefing Schedule, Docket No. 2011-3 CRB (May 17, 2013).

II. Summary of Parties' Arguments

In the sole brief submitted in relation to the referred novel material question to the Register, the Settling Participants assert that it is clear that the CRJs have the authority to issue the confidentiality provisions. In support of this position, the Settling Participants point to three distinct but overlapping statutory grants to the CRJs, namely the authority to: (i) adopt settlements; (ii) determine terms; and (iii) establish notice and recordkeeping requirements. The Settling Participants claim that each of these grants of authority provides an independent basis for adoption of the confidentiality provisions by the Judges. Brief of Settling Participants, Docket No. 2011-3 CRB Phonorecords II (June 7, 2013) at 6-17.

The Settling Participants point out that analogous statutory provisions grant authority relative to the section 114 statutory license, and that based on such grants the Register, the Librarian of Congress and the CRJs have routinely adopted section 114 confidentiality provisions that are equivalent to the instant confidentiality provisions. The Settling Participants

posit that the confidentiality provisions at issue here are like confidentiality provisions adopted pursuant to the section 114 license and that the only thing that distinguishes section 115 from section 114 in this regard is the grant of certain exclusive authority to the Register with respect to statements of account under section 115. They assert that because the Register has determined that the CRJs' adoption of the confidentiality provisions does not encroach on the Register's power with respect to statements of account as provided in section 115(c)(5), there is no question that the statutory language granting authority to the CRJs is sufficient to empower them to adopt the confidentiality provisions. *Id.* at 6-7.

The Settling Participants assert that the CRJs have both the authority and the obligation to adopt settlements among some or all of the participants in a proceeding unless the agreement is contrary to law or a participant in the proceeding objects and the CRJs conclude that the settlement "does not provide a reasonable basis for setting statutory terms or rates." *Id.* at 7, citing 17 U.S.C. 801(b)(7)(A). They state that Congress' clear goal was to streamline the adoption of settlements. They point to legislative history as support for the proposition that Congress intended the CRJs to facilitate and encourage settlement agreements. *Id.* at 7-8, citing H.R. Rep. No. 108-408, at 24 and 30 (2002). They add that in adopting previous settlements the CRJs have acknowledged this obligation, stating "we are mandated to adopt the determination of the settling parties to a distribution and rate proceeding" *Id.* at 8, citing 74 FR 4510, 4514 (Jan. 26, 2009). The Settling Participants also note that the Register has confirmed that section 801(b)(7)(A) generally directs the CRJs to adopt settlements, except to the extent that a participant in the proceeding objects to the settlement or where the settlement agreement includes provisions that are contrary to the provisions of the applicable license(s) or otherwise contrary to statutory law. *Id.* at 8-9, citing 74 FR 4537, 4540 (Jan. 26, 2009).

The Settling Participants point out that the only suggestion that anyone has made that the settlement is contrary to law concerned the question of whether there was an encroachment of the Register's authority with respect to statements of account, and, in that case, the Register determined that there was no such encroachment. *Id.*, citing 78 FR 28,773 (May 16, 2013). The Settling Participants assert that nothing in the statutory text, its legislative history, or any binding precedent, suggests that the CRJs' authority - and duty - to adopt settlements has any exception for provisions that impose obligations on copyright owners. They also point toward settlements under the section 114 license that impose confidentiality requirements, which have never been challenged by the Register. *Id.* at 9-10.

The Settling Participants state that the grant of authority to determine reasonable terms of royalty payments permits the CRJs to adopt the confidentiality provisions as terms and make them binding on copyright owners. They point out that the statute expressly states that "[t]he schedule of reasonable rates and terms determined by the Copyright Royalty Judges shall . . . be binding *on all copyright owners of nondramatic musical works* and persons entitled to obtain a compulsory license." 17 U.S.C. 115(c)(3)(D) (emphasis added).

The Settling Participants point to the D.C. Circuit's finding that analogous language in section 114 was sufficient to justify imposing audit terms on agents of copyright owners. *Id.* at 11, citing *Recording Indus. Ass'n of Am., Inc. v. Librarian of Congress*, 176 F.3d 528, 535 (D.C. Cir. 1999). They also refer to the legislative history as support for the CRJs' authority to impose confidentiality provision requirements on copyright owners. *Id.* at 11-12, citing S. Rep. No. 104-128, at 40 (1995). The Settling Participants then refer to the Register's prior description of the CRJs' power to determine terms under section 115, which included a conclusion by the Register that the CRJs may issue terms that are necessary to effectively implement the statutory license

and that the authority to set reasonable terms extends only so far as those terms ensured the smooth administration of the license. *Id.* at 12, citing 73 FR at 48,398 (Aug. 19, 2008). They point out that when making such findings regarding the scope of the CRJs authority to issue terms under section 115, the Register properly relied on authority construing analogous section 114 provisions regarding the CRJs authority to issue terms. *Id.* at 13.

The Settling Participants point to the long history of agents of copyright owners being required to maintain the confidentiality of statements of account as a section 114 term, and that the Register has endorsed such terms under the CARP system and has never taken exception to such terms issued by the CRJs. *Id.* at 13-15. The Settling Participants state that in the context of the percentage rate structure for section 115 rates, the statements of account contain sensitive financial information and that the confidentiality provisions avoid the risk of competitive injury to users of copyrighted works while ensuring the smooth administration of the license and effectively implement the statutory license. *Id.* at 15.

The Settling Participants point to the CRJs' notice and recordkeeping authority as support for the confidentiality provisions. *Id.*, citing 17 U.S.C. 115(c)(3)(D), 17 U.S.C. 801(b)(7)(C), and 17 U.S.C. 803(c)(3). They point out that similar provisions authorize the CRJs to issue notice and recordkeeping requirements under the section 114 license. They assert that if section 114 notice and recordkeeping authority permits imposing a requirement of confidential treatment for a report of use, section 115 notice and recordkeeping authority must also permit imposing a requirement of confidential treatment for a section 115 statement of account. *Id.*, at 16-17

III. Register's Determination

Pursuant to 17 U.S.C. 802(f)(1)(B), the Register issues this timely response to the referred novel material question and determines that the CRJs do not have the authority to adopt the

provisions imposing a duty of confidentiality upon copyright owners, regardless of whether the provisions are included in a voluntarily negotiated license agreement between copyright owners and licensees.

A. CRJs' authority to determine reasonable terms of payment

Under section 115(c)(3)(C), the CRJs are authorized to “determine reasonable rates and terms of royalty payments.” 17 U.S.C. 115(c)(3)(C). However, the confidentiality provisions at issue here would function as an obligation on copyright owners who have already received royalty payments. This kind of restriction is distinct in its nature and potential impact than the terms of royalty payments offered as precedent by the Settling Participants.

It is true that section 115(c)(3)(D) states “[t]he schedule of reasonable rates and terms determined by the Copyright Royalty Judges shall . . . be binding on all copyright owners of nondramatic musical works and persons entitled to obtain a compulsory license.” 17 U.S.C. 115(c)(3)(D). It is also true that the D.C. Circuit, in *Recording Indus. Ass'n of Am., Inc.*, 176 F.3d at 535, found that analogous provisions governing the section 114 license authorize binding copyright owners and their agents with regard to terms concerning the audit of royalty payments. However, the audit provisions at issue before the D.C. Circuit were terms that applied to the method by which accurate royalty payments make their way to copyright owners, and served as an obligation on intermediaries to allow copyright owners to ensure the accuracy of such royalty payments. Similarly, the confidentiality provisions that have been repeatedly established under section 114 are terms that address the method by which accurate royalty payments make their way to copyright owners in accordance with the statute. The confidentiality provisions currently at issue are very different and are not “terms of royalty payments.” They do not address the method by which accurate royalty payments make their way to copyright owners. Indeed, the

Settling Participants assert that the confidentiality provisions are intended to prevent the risk of competitive injury to licensees by disclosure of the licensees' financial information.

While the confidentiality provisions may avoid a risk of competitive injury for licensees, such provisions are not necessary to effectively implement the statutory license or to insure the smooth administration of the license. The Register notes that the previous determination of rates and terms for the section 115 license, which also included a percentage rate structure, did not include such provisions and the Settling Participants do not identify any apparent detrimental effect on administration of the license.

Having found that the confidentiality provisions are not the sort of terms of payment that the CRJs are authorized to issue, the Register also notes a policy concern that, in the context of statutory licenses, government actors should err on the side of transparency. Transparency, serves to provide maximum confidence in the law for all who rely upon it, including those who require access to the details of license records.

B. CRJs' authority to establish notice and recordkeeping requirements

The relevant notice and recordkeeping provisions authorize the CRJs to “establish requirements by which copyright owners may receive reasonable notice of the use of their works under this section, and under which records of such use shall be kept and made available *by persons making digital phonorecord deliveries.*” 17 U.S.C. 115(c)(3)(D) (emphasis added).³ By the clear language of the statute, the CRJs are authorized to issue notice and recordkeeping requirements under which records of such use shall be kept and made available *by licensees*. Section 115(c)(3)(D) does not provide authority for the CRJs to issue notice and recordkeeping requirements under which records of such use shall be kept and made available *by copyright*

³ See also, 17 U.S.C. 803(c)(3) (“the Copyright Royalty Judges may specify notice and recordkeeping *requirements of users of the copyrights at issue*”) (emphasis added).

owners. The Settling Participants have not pointed to any other authority by which the CRJs' notice and recordkeeping authority authorizes the imposition of obligations on the copyright owners who are subject to the section 115 license.

C. CRJs' authority to adopt settlements

The Register acknowledges that Congress' clear goal was to streamline the adoption of settlements. However, the provisions of section 801(b)(7)(A) under which the CRJs are able to adopt aspects of an agreement are limited. The CRJs are not compelled to adopt a privately negotiated agreement to the extent that it includes provisions that are inconsistent with the statutory license. As the Register has stated previously, section 801(b)(7)(A) "does not foreclose the CRJs from ascertaining whether specific provisions are contrary to law." *See* 74 FR 4537, 4540 (Jan. 26, 2009). The Settling Participants acknowledge that section 801(b)(7)(A) generally directs the CRJs to adopt settlements, *except to the extent* that a participant in the proceeding objects to the settlement or *where the settlement agreement includes provisions that are contrary to the provisions of the applicable statute or otherwise contrary to statutory law*. Brief of Settling Participants, Docket No. 2011-3 CRB Phonorecords II (June 7, 2013) at 8-9, citing 74 FR 4537, 4540 (Jan. 26, 2009). Moreover, courts have consistently held that agencies cannot adopt regulations that are contrary to law. *See, e.g., Cal. Cosmetology Coalition v. Riley*, 110 F.3d 1454, 1460-61 (9th Cir. 1997) ("The power of an administrative officer or board to administer a federal statute and to prescribe rules and regulations to that end is not the power to make law, for no such power can be delegated by Congress, but the power to adopt regulations to carry into effect the will of Congress as expressed by the statute. A regulation which does not do this, but operates to create a rule out of harmony with the statute, is a mere nullity.").

As set forth above, the Register determines that the CRJs do not have the statutory authority to adopt confidentiality provisions that would impose obligations on a copyright owner with regard to what he or she is able to do with a statement of account received by a licensee. The Register's finding of the lack of CRJs' authority to impose such confidentiality requirements

is consistent with court findings that statutory licenses must “be construed narrowly,” especially as they apply against the rights of copyright owners. *See, e.g., Fame Publ’g Co. v. Alabama Custom Tape, Inc.*, 507 F.2d 667, 670 (5th Cir. 1975). Accordingly, the Register reads the statute as precluding the CRJs from adopting the confidentiality provisions, including in the context of a negotiated license agreement.

July 25, 2013

Maria A. Pallante,
Register of Copyrights.